



Agenda Date: 2/1/06
Agenda Item: 4A

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

TELECOMMUNICATIONS

IN THE MATTER OF THE JOINT
PETITION OF SBC COMMUNICATIONS INC.
AND AT&T CORP, TOGETHER WITH)
ITS CERTIFICATED SUBSIDIARIES FOR
APPROVAL OF MERGER

ORDER

DOCKET NO. TM05020168

(SERVICE LIST ATTACHED)

BY THE BOARD¹:

The New Jersey Board of Public Utilities ("Board"), pursuant to N.J.S.A. 48:2-1 et seq., has been granted general supervision and regulation of and jurisdiction and control over all public utility systems which operate within the State of New Jersey, including telephone companies such as AT&T Communications NJ, L.P. ("AT&T"). Moreover, the Board has specifically been granted the authority to review certain mergers and acquisitions by and of such public utilities, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10. Pursuant to said authority, the within matter was initially opened to the Board upon the joint filing of a request by AT&T, together with its certified subsidiaries, and SBC Communications Inc. ("SBC," jointly "petitioners") for Board approval of their proposed merger. In connection with this matter, the Board, with Commissioner Frederick F. Butler as presiding officer, conducted hearings on June 14 and 15, 2005, in which six witnesses for petitioners were cross-examined, two rounds of briefing were conducted, and numerous documents were marked for identification and offered into evidence as part of the record of this proceeding. By Order dated October 4, 2005, based on the full record in the case, the Board approved the merger without conditions requested by the Division of the Ratepayer Advocate ("RPA") and explained in detail why the requested conditions were not warranted under N.J.S.A. 48:2-51.1 and other relevant State law.

By letter dated November 29, 2005, the RPA requested that the Board modify its approval of the SBC/AT&T merger to impose conditions on the combined entity. The RPA cites the merger conditions imposed on petitioners by the Federal Communications Commission ("FCC") in support of its request for modification, and also alludes to related conditions imposed by the Department of Justice ("DOJ"). Pointing to statements made by individual FCC Commissioners, who expressed concern regarding the nationwide state of telecommunications competition, the RPA argues that the FCC's actions necessitate imposition of identical conditions by this Board. The RPA also urges the Board to impose additional conditions (those that it advocated before the Board during the merger review proceeding) on the combined company, since the FCC's action "demonstrates and reinforces the prior concerns raised by the Ratepayer Advocate."

¹ Commissioner Joseph L. Fiordaliso abstained from voting on this matter as he was not a member of the Board when its original decision was rendered.

11/29/05 Letter at 2. The RPA states its belief that the conditions imposed by the FCC will help defray any possible anti-competitive concerns at the national level, and that the Board should independently adopt the same conditions on the state level. The RPA further states in a reply letter, dated December 15, 2005, that this Board enjoys the authority to modify its own orders pursuant to N.J.S.A. 48:2-40 and N.J.A.C. 14:1-8.6(b), and that its letter motion should be considered a request for such relief, rather than a motion for reconsideration under N.J.A.C. 14:1-8.6. The RPA also cites a media report alleging that AT&T managers are in line to receive significant bonuses as a result of the merger.

Petitioners filed a written response on December 2, 2005. They first inform the Board that the merger in question closed on November 11, 2005, as per petitioners' notice to the Board on November 28, 2005. Petitioners further characterize the RPA's request as a motion to reconsider the Board's final decision which, according to petitioners, is untimely under N.J.A.C. 14:1-8.6(a). Petitioners also argue that the RPA's request lacks substantive merit, since the FCC's actions do not constitute a material error by the Board in its review of the merger or new evidence necessitating modification or reconsideration of the October 4, 2005 Order. According to petitioners, the commitments made to the FCC and/or DOJ have no effect on the administrative record established before the Board in this proceeding, upon which the Board based its decision. Petitioners also urge the Board to refrain from adopting the RPA's proposed additional merger conditions, which the Board expressly rejected in its October 4, 2005 Order.

Board Staff ("Staff") submitted a written response to the RPA's request on December 9, 2005. Staff also characterizes the request as a motion for reconsideration under N.J.A.C. 14:1-8.6, and argues that the RPA has failed to enumerate any alleged errors of law or fact that the Board relied on in approving the merger. Nor, according to Staff, do the conclusions reached and the actions taken by the federal government in connection with its review of this merger constitute "additional evidence" as contemplated in the aforementioned Board regulations. Staff asserts that the RPA's request appears to be a manifestation of its continuing disagreement with the Board's decision in this matter, but that such disagreement is inadequate to justify modification of the Board's approval.

DISCUSSION

As an initial matter we acknowledge that the RPA has styled its request as a motion to modify the Board's Order under N.J.S.A. 48:2-40 and N.J.A.C. 14:1-8.6(b), rather than a motion for reconsideration under N.J.A.C. 14:1-8.6. We agree with the RPA that the Board retains the statutory authority to modify its own orders should sufficient justification for doing so exist. However, given the RPA's status as a party in this matter we see little difference between the two remedies. The RPA must still demonstrate to the Board that sufficient grounds exist for altering its previous decision. This the RPA has failed to do.²

We find no justification whatsoever for modifying the Board's October 4, 2005 Order approving petitioners' merger without conditions. We agree with petitioners and Staff that the RPA has made no showing that this Board misconstrued the record before it, erred in its legal or factual conclusions, or otherwise failed to undertake the statutory analysis set forth in N.J.S.A. 48:2-51.1 or any other relevant State law in an adequate manner. Nor does the RPA point to any changed circumstances, either legal or factual, that would require the Board to revisit its conclusions regarding this merger. While the FCC has indeed imposed conditions on the merger on a national level (and petitioners have also entered into an agreement with DOJ requiring them to undertake certain actions to prevent competitive harm to national

² Given our ultimate denial of the relief sought by the RPA in the instant motion, we do not reach the issue of whether said motion was time-barred under N.J.A.C. 14:1-8.6.

telecommunications markets), these particular developments do not, *per se*, alter the Board's review of the merger under State law, as the RPA appears to argue. Pursuant to N.J.S.A. 48:2-40, the Board may reexamine any factual or legal conclusion it has previously reached based on the record before it, and regulatory action by the federal government may serve as a catalyst for such reexamination. However, if a party seeks a modification or reconsideration of a Board Order it must still set forth some legal or factual error, or new evidence or argument, none of which is presented here.

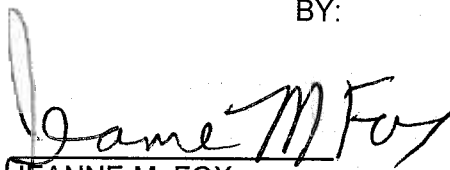
Pursuant to its statutory mandate, the Board undertook an exhaustive and detailed review of the record before it to determine what impact the proposed merger would have on New Jersey in four broad but discrete areas. See N.J.S.A. 48:2-51.1. The RPA does not allege any specific inadequacies in this review, but merely states that the FCC, looking at the merger from a nationwide perspective, on a vastly different record, and utilizing a different legal standard and set of procedures, determined that some conditions were warranted. The RPA also argues that the FCC's action reinforces its own arguments previously made before the Board in this proceeding. However, given the manifest differences between the tasks undertaken by the Board and the FCC, we do not see how the actions of the latter invalidate, *per se*, the conclusions of the former. The record upon which we based our conclusions remains what it was at the time of our Order of Approval. Thus, we decline at this juncture, based on the RPA's showing, to reopen this proceeding or modify the Board's October 4, 2005 Order.

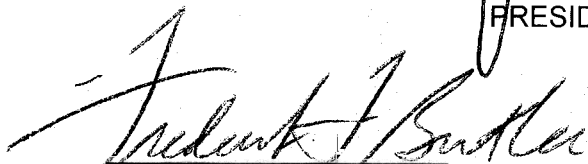
We also reject the RPA's request to impose the same additional merger conditions we expressly rejected previously. As stated above, the RPA points to no error or change of circumstances that would cause us to reassess our prior conclusions or believe that a modification of the October 4, 2005 Order is appropriate. As pointed out by Staff, the RPA's disagreement with those conclusions, without more, is not sufficient grounds for revisiting them.


Accordingly, consistent with the foregoing, we **ORDER** that the Division of the Ratepayer Advocate's request for modification of the Board's October 4, 2005 Order approving petitioners' merger is **HEREBY DENIED**.

DATED: 2/2/06


BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT

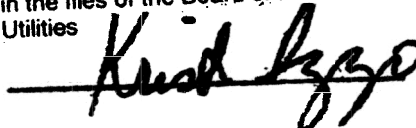

FREDERICK F. BUTLER
COMMISSIONER


CONNIE O. HUGHES
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities



AT&T/SBC MERGER SERVICE LIST

DOCKET NO. TM05020168

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